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ON RACE AND DIVERSITY

*David P. Bryden **

The following dialogue, while founded on a genuine problem, and not wholly devoid of realistic touches, is basically fictional. Its content differs radically from any faculty retreat or meeting that I have attended or learned of from others, and it takes place at a purely imaginary law school. Faculties, like other organizations, proceed on the basis of a common institutional history and a set of more or less shared assumptions. Concerning racial criteria in admissions and hiring, such differences as exist are largely unexpressed. My choice of a faculty retreat as the setting for a dialogue about this topic was dictated less by realism than by my belief that the problem lends itself to treatment in the form of a highly discursive dialogue.

The scene is an enormous, baronial dining room. On the walls are huge murals of English hunt scenes. The faculty is seated around a long, oval table.

THE DEAN: Welcome to Fair Haven! Was that Bernie I saw paddling a canoe last night?

BERNIE: I was just trying to find out why they named it Lost Maiden Lake.

THE DEAN: By edict of the dean, the sherry—which I see some of you eyeing—is reserved for the afternoon session. As you know, the first item for discussion during this retreat is the report of the Ad Hoc Committee on Admissions Criteria. Contrary to our usual practice at retreats, we will bring the Committee's proposal to a vote. Hopefully, though, the more relaxed atmosphere at Fair Haven will be conducive to a more thorough discussion of this important problem than might be possible at a regular faculty meeting. So without further ado, I'll turn the meeting over to the chair of the Committee. Brad?

BRAD: I assume you all got copies of our report. To summarize it briefly, the Committee recommends certain changes in our criteria for student admissions, in light of the Supreme Court's holding in the *Croson* case.¹ The Court held that municipalities and states may not establish set-asides for public contracts on a racial basis—

* Professor of Law, University of Minnesota. I want to thank Mary Ann Isaacs and Laurie Newbauer for typing assistance above and beyond the call of duty. I am also indebted to Eric Levinson, John Rogers, and Martin McMahon for suggestions based on an earlier draft of this article. We did not always agree, which made their advice all the more valuable. Lori Peterson helped me track down footnotes.

1. *Richmond v. J.A. Croson, Co.*, 109 S. Ct. 706 (1989).

for example, deciding in advance to award thirty percent to blacks. Although our admissions program doesn't work on a rigid quota basis, and is at least arguably distinguishable from a set-aside, we believe it would be advisable to make certain changes in light of the decision. Specifically, we recommend that the faculty adopt a "diversity" standard for admission of students below the "automatic admit" cutoff.

FRANK: Point of information. I thought we already had a diversity standard after *Bakke*.

BRAD: My understanding is that perhaps a few non-minority students were admitted on that basis, but basically it was a program for minorities.

FRANK: And our scholarship program: Was that diversity or minorities?

THE DEAN: The faculty resolution was that fifty percent of our scholarship funds would be allocated to our affirmative action program, on the basis of comparative need within that category rather than within the student body as a whole.

FRANK: Was that changed after *Bakke*?

THE DEAN: No; I don't think that issue ever arose.

BRAD: That's right. Perhaps I should give you a little background on that. In *Bakke*, a medical school had a program under which minorities were preferentially admitted. Four Justices took the position that racial criteria in admissions were invalid, and four others thought that they were valid. Justice Powell was the swing vote, and he wrote an opinion saying that racial criteria are valid only if they are part of a general effort to achieve a more diverse student body. Many people regarded Powell's opinion as the law on this subject, but it was the only opinion in *Bakke* that came down in favor of a "diversity" standard, so you might say that the Court as a whole rejected that approach. We talked to the University Attorney, and the general feeling was that there was no law on that subject—no majority in favor of any approach. So we didn't feel that a change was called for. In light of the *Croson* case, however, and bearing in mind the possibility of a *Bakke*-type lawsuit, we now feel that some changes are in order. Our recommendation, specifically, is as follows:

The Admissions Committee, in determining whom to admit from the "deferred" category, shall implement the guidelines of the Faculty Statement on Diversity (copy attached).

FACULTY STATEMENT ON DIVERSITY

In order to secure the benefits of a diverse student body, including but not limited to enrichment of the educational process by nonmajority experiences and points of view, provision of role models for underrepresented and disadvantaged

groups in our society, and a more diverse legal profession, it shall be the policy of this law school to supplement traditional academic criteria for admission with non-traditional criteria indicative of a student's potential contribution to attainment of these objectives.

THE DEAN: Under our rules, a committee recommendation does not need a second. Any discussion?

SARAH: For the benefit of some of us younger faculty, could someone outline the original affirmative action rationale?

BRAD: On page four of our report there's a list of what we see as the primary justifications: "1) to refine narrowly-academic admissions criteria by taking account of indicia of the applicant's potential contributions to the educational process and the legal profession; 2) to enrich class discussions with diverse viewpoints and experiences; 3) to enrich student interactions outside class; 4) to break down racial stereotypes; 5) to provide role models for disadvantaged and underrepresented groups; 6) to offer tangible signs of progress in integrating minority and disadvantaged groups into the American mainstream; 7) to enhance the opportunities for members of disadvantaged groups to escape poverty; 8) to diversify the legal profession; and 9) to increase the opportunities for members of minority and disadvantaged groups to obtain affordable assistance by knowledgeable and empathetic counsel."

THE DEAN: The only thing I might add to that list, Sarah, is the feeling that in the case of disadvantaged groups the student's academic potential is not always fully reflected in test scores. Maybe that's implicit in Brad's first rationale.

SARAH: Haven't there been studies which found that traditional criteria *over*predict the academic performance of black students?² I believe that's what I read.

THE DEAN: I don't know; I haven't heard of anything like that.

LLOYD: Even if that's the case, performance in law school isn't a perfect predictor of success in practice. We need to rely less on rigid, traditional definitions of intelligence and competence. I'm not sure whether the traditional criteria discriminate against women and minorities, as some people have alleged, but even if they don't they have very limited validity. There's more to law practice than "pattern analysis," or figuring out how fast a train has to go in order to meet another train in Portland at 10:00 a.m., or learning the Rule Against Perpetuities, or even distinguishing cases. All of us got very high scores on tests, but there are people on this faculty I wouldn't want to represent me in court, or help me get divorced.

2. R. KLITGAARD, CHOOSING ELITES 176 (1985).

We all know that the practice of law calls for talents like negotiating ability that law school tests don't measure.

BERNIE: And therefore? Let's assume you're right about grades and tests. Even on that assumption you're overlooking several problems. To begin with, nobody knows how to measure and predict things like the potential negotiating ability or the common sense of thousands of applicants to law school. And second, since whites as well as blacks have negotiating ability, forensic ability, community activities, et cetera, and since white applicants greatly outnumber blacks, there's no genuinely neutral criterion that will alter the racial mix of the entering class as much as you want to alter it. For all we know, some of the criteria we come up with to reduce our reliance on grades might exclude minorities just as much as grades do, or even more, if they're administered honestly. If you want racial results, you need a racial criterion. The only issue is whether to try to conceal it. I also think you're putting the admissions cart before the educational horse. Traditional admissions criteria are designed to help us predict success in traditional schools. They don't do it perfectly, but they do it better than any known alternative. If we want a different type of school, we should make that change before changing the admissions criteria.

BRAD: In my judgment, that's an overstatement. I don't think race-consciousness, judiciously employed as part of a diversity program, is irrelevant to our normal concerns as legal educators. For example, I think an attorney from a similar racial background can better understand and empathize with a client in certain kinds of cases involving the problems of disadvantaged groups. To me, that's one of the justifications of a more diverse student body. From one point of view, that's a racial criterion, but from another point of view we're selecting more effective lawyers.

BERNIE: I don't see why an upper-middle-class black is better able to understand the legal problems of a poor black on welfare than a white lawyer would be. Why do you think that black people are all alike? If someone said that poor whites need middle-class white lawyers, because middle-class blacks can't understand their problems, we'd call that idea false and maybe even "racist." Anyway, what makes you think that our minority students work for black clients after they graduate? Most of them go to the same kinds of firms and government jobs as whites. Their clients are mostly white, so if they're effective lawyers it's because race isn't critical.

HARVEY: I think blacks understand white culture a lot better than we understand theirs; so I disagree with Bernie on that. But I

agree there is a problem getting enough minority lawyers in the ghetto, particularly after what Republicans did to slash funding for the Legal Services Corporation. I wonder whether we should make our preferential admission program conditional on the student's promise to work a certain number of years in community service.

BERNIE: I'd like to see a movie of the dean proposing that to the Third World Caucus. How can we possibly tell our black students that they have to go out and do community service while their white classmates are raking in high salaries? If we want to help black lawyers, we should help them find rich clients, not poor clients. And if we want to help black clients, we should steer them to the best lawyers we can find, regardless of race.

BRAD: I would just like to emphasize that we're talking about people in the deferred group who according to the traditional predictors are perfectly capable of doing adequately in law school. Nobody is proposing to admit incompetent students who are expected to fail.

BERNIE: May I respond to that? You can't have it both ways. Advocates of this program are always saying that without affirmative action there will be hardly any minority lawyers. If that's true, it must mean that affirmative action lowers the standards of the legal profession as a whole. Maybe that's acceptable, and maybe it isn't, but let's begin by admitting it. Now if you want to talk about whether the preferentially admitted students at a particular school are predicted to fail out, I'll concede that they aren't. I don't think that proves much, but I'll admit it's true. Maybe all it proves is that we've inflated our grading of all students, and made it easier for students with bad grades to stay in school, during the same period as we've had affirmative action.

NORMA: The obsession with "standards" is irrelevant to the legal problems of underprivileged people. The so-called "best lawyers" are getting rich working for corporations. They're not going to draft a will for a poor black woman. And it's also nonsense to pretend that you need to be another Henry Friendly in order to do a competent job solving the legal problems of ordinary people. That sort of elitist myth is flattering to our egos, because most of us are good at analyzing extremely complex, academic, legal issues. But in the practice of law all the talk about competence obscures the real problem: the fact that we haven't delivered affordable legal services for minorities and the poor. If you're poor, the high standards of the bar don't do you a bit of good. Those standards may be one of the reasons why you can't afford a lawyer.

HARVEY: I'm troubled by several things. Has the Committee ar-

rived at an understanding of what sorts of students other than minorities might be admitted under the diversity criterion?

BRAD: We agreed that some whites, who would contribute to diversity, should be admitted. We decided not to tie the Admission Committee's hands by specifying all the possible types, but one type, for instance, would be whites from disadvantaged backgrounds.

HARVEY: Under our old program didn't we admit a white student who had been in reform school?

BRAD: You mean the one who committed suicide?

THE DEAN: Terry McMaster. He wrote a letter to the Admissions Committee. He had one of the most disadvantaged backgrounds you've ever seen: not just reform school, but a couple of arrests, an alcoholic mother, father died young as I recall. He was from Blue Heron County.

STANLEY: Don't put it that way: *I'm* from Blue Heron County!

THE DEAN: Bernie, and then Fritz.

BERNIE: This is ridiculous.

TOM: That's O.K., we'll listen to it anyway, Bernie.

BERNIE: Why should someone whose father was an alcoholic and who went to reform school or stuck up a store be admitted to law school ahead of someone ordinary? What's it supposed to prove?

FRITZ: I'll speak to that. The feeling originally, when we first got into affirmative action, was that although the program was primarily for minorities we should also admit some disadvantaged whites, because we recognize that there are also many whites who are disadvantaged in this country—like Appalachians. At the same time, we wanted to keep the focus on minorities because if you really make the focus on disadvantaged people in general then you'll defeat the purpose of the program, because most disadvantaged people are white. I also think—

BERNIE: That's not responsive. My question was: What exactly do we think we're doing when we admit an unqualified student because his father was a drunk?

THE DEAN: We have several people who wish to talk, and it will facilitate things if interruptions are kept to a minimum. If I may interject here, the answer to your question, Bernie, is that we haven't really done that, except maybe in the one case I mentioned.

TOM: One reason to favor disadvantaged people like McMasters—although we may have made a mistake in his case—is that their achievements with their handicaps are more impressive than similar achievements of students who didn't have severe handicaps. They would have achieved more if they hadn't been disadvantaged.

BERNIE: I don't agree. In the first place, it would take a hundred Freuds to figure out which of two people overcame greater handicaps. And after the Freuds figured it out, the Jungs would disagree. In practice, the only kinds of handicaps that our Admissions Committee will consider are presumptive ones instead of real ones: the black student will be treated as presumptively disadvantaged, even if his parents are affluent and well-educated, and a white kid who had colossal problems with his parents or his peers or what-have-you, and whose parents spent their time partying instead of reading, will be presumed to have had no serious disadvantages, at least if he's middle-class. Our ideas about "disadvantaged" people are about as deep as the *Style* section of a newspaper: if Pablo Picasso or Francisco Franco had moved to Mexico, we would've treated his descendants as "disadvantaged." Even if we really knew which students had overcome handicaps, I don't see why that would justify preferentially admitting them. We're not in the business of giving awards for having had a tough life or even for surmounting difficulties—any more than for charitable work or kindness toward animals. If he didn't meet our usual criteria, and if there's no valid reason to suppose that our criteria underpredict his likely success in law school, then he's an admirable guy who belongs elsewhere—period.

NORMA: In the first place, it's pretty ironic that you defend the LSAT—which requires all sorts of presumptions and generalizations—but object to a presumption that Afro-Americans have had to overcome more handicaps than whites. What we should be talking about is compensatory justice. It's not just blacks; it's Native Americans and women too, although this particular program doesn't include women as such.

BERNIE: You mean compensation for discrimination?

NORMA: Yes.

BERNIE: What if the victims of discrimination are more affluent than the discriminators? Are Jews and Catholics eligible? Did you know that Catholics on average earn more than Protestants whose ancestors came from the same country in Europe?³ And since you mentioned women, let me ask you another question: If past discrimination is the rationale of this program, why don't we preferentially admit women regardless of their race?

NORMA: What we should be looking for are cases where official social policy supported the discrimination. When that occurred,

3. The subject is judiciously analyzed in two essays by Christopher Jencks, in the *New York Review of Books*, Mar. 3, 1983, at 23; Mar. 17, 1983, at 12. See generally, *Why Are Blacks Paid Less?*, 1 CONST. COMM. 191, 192 (1984).

then official policy can support a program to compensate for the discrimination. In principle, women should be included, but it hasn't been necessary in this context. In other contexts, where women are more severely underrepresented—such as faculty hiring—they should be included. The goal of the program for minorities is identical to the goal of affirmative action for women: to give representation to groups that the law has marginalized and silenced.

JERRY: You belong to a "*silenced*" group?

BERNIE: Some of our immigration laws were official policy against Eastern and Southern Europeans. So Poles and Italians and Jews would get preferential treatment under your criterion, at least if they came from those areas. Our laws discriminated against their ancestors. As far as I know, official policy has not been anti-Vietnamese except in regard to immigration at one time; so they should be treated the same as Jews and Southern Europeans. Are you ready to make a motion to that effect?

NORMA: We're talking about a combination of factors. First: a history of victimization. And second: the group is underrepresented. Concerning victimization, we could reasonably distinguish immigration laws on the ground that we're talking about victimization of people who are already part of our society, rather than exclusion of people who live elsewhere. Concerning underrepresentation: In the legal and academic professions, Jews don't meet that criterion. Maybe Italians do; maybe they don't. The Vietnamese meet both criteria. The whole Vietnam War was official policy that had devastating effects on the Vietnamese. And all Asian-Americans, including Vietnamese, are grossly underrepresented in the legal profession.

BERNIE: The Vietnamese who are coming to this country *wanted* us to intervene in the Vietnam War. Why do you think they risked their lives to leave Vietnam? Besides, I thought you wanted to limit the concept of victimization to people who were living in America when they were victimized.

DON: I think it ought to be a question of distributive justice. I would favor benefitting individuals within disadvantaged groups even if the beneficiaries are middle class. It doesn't bother me to exclude people who are poorer than the beneficiaries. What we should be concerned about is the injustice of having some racial groups worse off than others across the board. Blacks, Chicanos (I don't want to say "Hispanics," because that would include Cubans), some women—although that's more complex. In a sense, discrimination is irrelevant to my theory. I don't think it matters *why* one group is worse off than another.

BERNIE: Then Jews and Irish Catholics should be excluded in favor of Anglo-Saxons, because on average Anglo-Saxons earn less today.⁴

DON: If you're right about that, we could still adopt my approach, and limit it to the most extreme cases of group disadvantage: Native Americans, blacks, Puerto Ricans, and Chicanos.

BERNIE: If you're going to exclude Cubans because they're well off, then you should also exclude West Indians.⁵

DON: Who are they? What countries? Jamaica?

BRAD: I think that West Indians can serve as role models for other blacks to a greater degree than Cubans can do that for Mexicans.

BERNIE: What about Cuban blacks?

DON: They probably should be included. I'm not going to try to work out all the details of application of the principle; I'm just trying to outline what I think the principle should be.

BERNIE: You still haven't explained why the extreme disparities in group affluence should be rectified. There's an infinitely large number of ways we could divide people into groups, from "all people of Slavic descent" to "all people married to a left-hander." Nobody really advocates equalizing the income of all "groups." For example, nobody on this faculty is bothered by the fact that, on average, people from Montana and Mississippi are poorer than people from Pennsylvania and Vermont. No one has proposed affirmative action for Montanans or white Mississippians. You either believe in equalizing all individuals, or else you have certain kinds of groups—such as certain races—you want to equalize. If it's the latter, then there has to be some reason why, out of all the millions of kinds of groups we could divide people into for purposes of trying to achieve equality, you chose racial groups. Once you give a reason, you'll have to defend it in terms of some policies other than abstract group equality. Even within the area of race, you need some ulterior criterion for deciding which groups to consider—whether West Indian blacks are a separate group, whether Cubans are lumped with other Hispanics, and so on. If you have good utilitarian arguments on all these questions, the abstract idea of group equality will be superfluous. And if you don't, "group equality" will just be metaphysical smoke.

NORMA: I can't believe my ears. Is it really so complicated? You're talking as if blacks were just another group—like Latvians or stamp collectors. That's almost willfully obtuse. For centuries

4. *Id.*

5. *Id.*

blacks were enslaved and murdered and segregated and discriminated against. Their descendants all suffer from that, and . . .

BERNIE: My ancestors didn't own slaves and didn't discriminate against blacks on account of their race. Neither do I. I'm sorry, but I don't feel guilty. I pity some poor people, regardless of their race, but I can't understand pity for someone simply because he's black; that's as insensitive as assuming he's a criminal because he's black.

NORMA: That's not the issue. Regardless of whether we individually contributed to it, every white profits from oppression of minorities because it improves his or her relative position. Every single black student, no matter how affluent she may be, probably has suffered from discrimination, and even if not, she suffers from the fact that other blacks are downgraded, which undermines the self-respect and confidence of all blacks. In addition, every Afro-American is descended from parents and grandparents who were oppressed. It's reasonable to assume that in most cases their records today would be better if this hadn't been done to them, and our relative credentials would look worse than they now do. You're also ignoring the pivotal role of networks and contacts, of which whites have almost a monopoly.

BERNIE: What's your standard of comparison? Should we really try to erase the effects of slavery? If slavery hadn't been done to their ancestors, they'd be back in Africa—maybe starving or being oppressed or killed by someone. They wouldn't have better LSAT scores; most of them wouldn't have any LSAT scores at all. I don't condone slavery or discrimination, but I don't see how you can say blacks would be better off today if they had been left alone in Africa. In some ways maybe they'd be better off, but in most ways they'd be worse off. Most of the Mexicans, if they'd stayed in their own country, would have been worse off than they are here. Why do we owe them? They're in the same ethical position as descendants of Irish or Sicilian immigrants: They came to this country to escape poverty, encountered some discrimination but also great opportunities, and generally improved their lot. The only major difference is that the Irish and Sicilians came earlier.

RICHARD: Everybody who's trying to wriggle off the hook of racial guilt begins by saying his ancestors didn't own slaves. I've never mentioned this before, but one of my ancestors had a few slaves, so I'm a little bit sensitive when the guilt lines are drawn on that basis. You didn't have to be rich to own a couple of slaves. And you didn't have to be a bad person. If they hadn't bought slaves, they would've invested in something else with equal market

value, and maybe I'd be better off today. So I don't see how it gave me an advantage over other people's ancestors. Anyway, slavery was legal then. Since we're all descended from rapists and crooks somewhere along the line, I don't see that I'm more guilty than anyone else. Even if it's just a question of guilt toward minorities, how does any of us know his ancestors' records? Maybe one of you had a great grandfather who wouldn't sell his house to colored people, or wouldn't let his daughter marry a Catholic. There's no way to tell.

SARAH: I think it's a mistake to try to decide who's to blame for black poverty and drugs and crime and so on. No matter who's to blame, we should adopt affirmative action if it's a good way to deal with the problem, and reject it if it isn't.

JOE: Bernie, are you saying that a black kid today has the same opportunities to advance as a white kid?

BERNIE: If he's equally qualified? In some fields, like construction, he probably has fewer opportunities than some whites, but in most cases what's holding him back is the fact that he's less qualified, which is the same problem other groups have had when they were getting started. When I was a kid, the ditchdiggers in my home town were mostly Italians. I'm sure there was some discrimination against Italians, but it would've been ridiculous to claim that the main reason they were ditchdiggers was that medical schools discriminated against them. They worked hard, saved some money, maybe became masons, and their children or grandchildren—kids I used to play with—joined the middle class. Two of my friends in high school were brothers. Their father was an Italian who dug ditches. One of the brothers went to Yale and became a doctor; the other one is the chief of police in my old home town. Now along comes the law faculty and tells me all this was a mistake: they should have had preferential treatment. By your logic we should have had affirmative action for Irish-Catholics and Jews in 1900, when they were almost totally unrepresented in the upper echelons of society. What did we do? Society took the position that as long as they weren't discriminated against too much, and maybe even if they *were* discriminated against, they would rise in the second and third generations and eventually the problem would be cured. And that's what happened. We didn't make them wards of the state; we told them they had to do it on their own, and they did. Why do we assume that blacks and Hispanics and Vietnamese can't do the same? Doesn't that reflect some sort of assumption of inferiority?

NORMA: Well, blacks have been here longer than Irish and Jews,

and they haven't yet been allowed to get their share of our national income.

BERNIE: Until a couple of decades ago, they were being forcibly restrained by segregation laws, so in effect they only got off the boat in the last couple of decades.

LEON: I don't think it would have been a great tragedy if we'd had some preferences for Jews and Irish-Catholics when they got off the boat. That's when affirmative action makes most sense, when a group is just getting started. Maybe we were too tolerant of group inequalities in those days.

NORMA: Nobody said that affirmative action is necessary in every individual case. Bernie grossly underestimates the extent of discrimination against minorities today. But even if he's right, it still boils down to discrimination plus the effects of discrimination against their ancestors. If your great-grandparents had been slaves, you'd be digging ditches too.

JERRY: And arguing with the masons.

JOE: You can't deny, Bernie, that this country has a huge black underclass. Doesn't that bother you?

BERNIE: Of course it bothers me. But this is a typical liberal program: redistribution from one part of the middle-class to another part of the middle-class, masquerading as help for the poor. It's like our programs for the elderly and farmers: the chants are socialist, but the checks are capitalist. Look, if you're really worried about poor people the admissions criterion should be stated in those terms instead of race or diversity. As far as I know, most beneficiaries of this program are going to live in nice houses no matter what we do. We're not lifting them out of poverty; we're lifting them out of bookkeeping. If you want an anti-poverty program let's design one. Of course, since most poor people are white, most of the beneficiaries of that program would be white. And since most poor people haven't got the talents that lawyers need, admitting them to law school would be a bizarre way of trying to help them.

NORMA: We have laws that give veterans preference over non-veterans when they apply for government jobs, even if the non-veteran is a woman and poorer.

BERNIE: I would prefer to compensate vets by raising taxes and paying them more while they're in the service. It's outrageous that some rich kid who had a desk job in the Pentagon gets hired ahead of a woman, or someone with a lower income who failed the army physical exam. But the politicians like affirmative action for vets because it keeps the veterans' lobby happy without requiring higher

taxes. The cost is hidden; most of the people who aren't hired never know why—just like affirmative action in universities.

NORMA: You keep talking about income. It isn't just a question of income. The culture of black poverty in Harlem or Indian poverty on the Pine Ridge Reservation is more self-destructive than the culture of white poverty.

BERNIE: But affirmative action hasn't changed that. How could it? The real victims of that culture are, by definition, kids who don't come close to qualifying for college, let alone law school—regardless of affirmative action. The people we admit with affirmative action are either already out of that culture or on their way out regardless of whether they go to law school. Law isn't the only middle-class occupation—look in the yellow pages. All we're doing is manipulating the racial mix of various middle-class occupations.

MARK: I think there's a danger of discussing this question in a historical vacuum. What it keeps coming down to, for me, is the fact that blacks have not been making the progress many of us once hoped for in terms of their slice of the national pie. I'm not saying it's all because of discrimination, but whatever the cause may be the progress that was hoped for during the 'fifties and 'sixties hasn't come about; in fact there was retrograde motion during the Reagan years.

BERNIE: You mean absolutely, or relative to whites with the same level of education, or relative to whites regardless of education?

MARK: Regardless of education—the last one.

BERNIE: Why does that matter? If blacks are becoming wealthier in every new generation, why does it matter whether whites are improving at an even faster rate?

NORMA: It matters because part of the black experience of subjugation has been due to their low place on the totem pole. "Wealth" is largely subjective and relative. A "poor" American black may be richer than an average Nigerian, but she still has to cope with the experience of being at the bottom of the heap—both personally and as a matter of group pride that engenders individual self-confidence. There's a lot of talk about a "merit" system. It isn't merit. Nobody deserves to have been born into a more successful group, or a less successful group, or to have had a mother on welfare instead of one who was president of some Women's Club.

BERNIE: All right, but you're assuming that the norm is equality among racial groups. Your theory is that black-white inequality is aberrational; it's a glitch caused by discrimination. If you just look at the history of white supremacy in this country, beginning with slavery, maybe that seems obviously true. But it didn't begin with

slavery: Slavery itself was caused by unequal power. If you look at all ethnic groups, including the various white groups, over all of human history, it makes more sense to assume that the norm is inequality. The Thais don't have as much as the Japanese, the Syrians don't have as much as the Israelis, the

NORMA: That's not the point. We're talking about *our* society, and

BERNIE: Well, in our society the Anglo-Saxons and the German-Americans don't earn as much as the Irish Catholics or the Jews, which are the two groups with the highest average incomes.⁶ Then there's another hierarchy among Third World groups: The Native Americans don't do as well as the blacks;⁷ the black males don't do as well relative to white males as the black females relative to white females;⁸ and the Afro-Americans don't do as well as the West Indians.⁹ Blacks overall don't do as well as Mexicans.¹⁰ Cuban Hispanics do better than Mexican Hispanics.¹¹

NORMA: So you're saying that races are genetically unequal.

BERNIE: Not at all. If all these groups are originally equally endowed with "good genes," then they should have *unequal* incomes here, on average, because this country doesn't get a representative sample of every ethnic group. You can call that Bernie's Paradox. It's pretty clear, for example, that the Vietnamese who come here are mostly from the top stratum. The Jews and Irish Catholics had suffered severe discrimination in Europe, so even the most talented members of those groups had a strong motive to emigrate. Maybe we got more of their best genes than of the English or Germans. In addition, there were environmental factors: Some groups came from peasant backgrounds, with fewer commercial skills, while others were more urban. Until relatively recently, most American blacks lived in backward rural areas, as their ancestors had in Africa. They may be just a generation or two behind the Sicilians who came here early in this century and were also from impoverished rural areas. Look at the pictures on the walls of our lounge: In the 1930s, the faculty looked like a convention of Presbyterian ministers. It's only since World War II that Eastern and Southern Europeans have made it in politics and elite occupations in this

6. *Id.*

7. *Id.* at 194.

8. *Id.* at 195.

9. *Id.* at 194.

10. T. SOWELL, *THE ECONOMICS AND POLITICS OF RACE* 187 (1983).

11. *See* *DIVIDED OPPORTUNITIES: MINORITIES, POVERTY, AND SOCIAL POLICY* 27 (G. SANDEFUR & M. TIENDA eds., 1988).

country.¹² Why is it surprising that blacks are a generation or two behind them? Yet every time I pick up the newspaper there's some horror story about the gap between whites and blacks. If we really start looking at economic progress in that way, and if the media start publicizing the full story, blacks aren't the only ones who are going to wonder why some other group is richer. Suppose we had a program that called for giving preferences to Italians over Jews, and that was supposed to last until Italians on average earn about as much as Jews. That seems to be what Justice Blackmun had in mind when he talked about using racial criteria to get beyond race. What would be a reasonable prediction as to how long that would take? If we don't expect Italians to earn as much as Jews, why do we expect blacks to earn as much as whites?

NORMA: The Jews didn't subjugate the Italians.

BERNIE: That's exactly my point: What I'm saying is that even without discrimination various groups have different average incomes. We know that it's mostly not due to discrimination, because the historical discriminators—the Protestants and the Anglo-Saxons—have lower average incomes than Jews and Irish Catholics—historical victims. The West Indians are black, and descended from slaves, but they do well compared to whites.¹³ Maybe we got an elite sample of them, just as with the Vietnamese.

DON: You're ignoring the possibility that the gap between Irish Catholics, for example, and Anglo-Saxon Protestants, might have been even larger if it hadn't been for discrimination.

BERNIE: Maybe. But so what? Do you want affirmative action for Irish Catholics? I thought you wanted equality among groups. If we really wanted equality among groups, we would be figuring out how to hold back the Asian-Americans, instead of giving them preferential treatment.

NORMA: This discussion is totally irrelevant. You're dealing with all sorts of side issues and not confronting the real issue. We're not trying to correct inequalities that are due to immigration patterns or the structure of our economic system; only the ones that are due to discrimination. The reason the income gap is tolerable in some cases but not in others is that in some cases it's due to discrimination and in some cases it isn't. Just because we don't expect it to disappear overnight, is no excuse for not trying to reduce the gap between groups that were beneficiaries of discrimination and groups that were victimized. Your argument is like saying that the *Mi-*

12. See generally R. CHRISTOPHER, *CRASHING THE GATES* (1989).

13. *Why Are Blacks Paid Less?*, *supra* note 3, at 192.

randa rule won't completely prevent coerced confessions and therefore we should overrule *Miranda*.

BERNIE: Why do you think this program will reduce the gap?

NORMA: At the undergraduate level studies have shown that a college degree is worth money, because people who have a degree earn more on average than those who don't, even if their qualifications are identical in other respects.¹⁴ Affirmative action increases the income of minority groups by increasing the proportion of minorities with college degrees. At the law school level, it's reasonable to assume that a minority who chooses law school usually will earn more as a lawyer than she would have earned in some other occupation, and will have more opportunities in politics and community leadership than if she'd become an electrician. By going to the state university law school, she will have an opportunity to acquire the kinds of personal contacts that whites have always used to get ahead. In addition, by getting into a better law school the minority law students will be afforded a better education—or what people think is a better education—than they could get without affirmative action.

BERNIE: The worst possible way to give them a good education is to admit them to a school where they're predicted to be near the bottom of the class and are constantly struggling to get by.

BRAD: By that reasoning, the minorities themselves would reject the program. I have no objection if you want to try to persuade them to reject affirmative action and go to some other school. I would try to persuade them otherwise, and they could decide. The program doesn't compel them to come here. If they accept your logic they'll turn us down.

BERNIE: How can they? In the first place, they've got egos, just like you and me. In the second place, the brutal truth is that most people don't go to school for an education as such; they go for a degree and to advance their careers. If I'm black, and Stanford admits me preferentially, suppose that I decline their offer and go to Outback Law School, where my abilities are average and I learn more and have a happier life as a student. When I graduate and look for a job, employers will assume that I needed affirmative action even to get into Outback. Even though I'll probably have better grades than him, an employer might hire a Stanford black ahead of me. So although it's bad for my education, and my peace of mind, I'll accept Stanford's offer in order to get their degree.

14. See generally C. JENCKS, WHO GETS AHEAD? THE DETERMINANTS OF ECONOMIC SUCCESS IN AMERICA (1979).

Equally important, a top school like Stanford is richer and so they'll probably offer a much bigger scholarship.

SARAH: I've always supported affirmative action, but this troubles me. It seems to me you should be looking for a good education, not just a good degree. Let me give an example from my own family. My kid sister was admitted to Lawrence, a small private college with an excellent reputation. According to the college guide we looked at, her aptitude test score was about average for Lawrence. She applied to Swarthmore as well, but didn't expect to be admitted there. A friend of mine knew some officials at Swarthmore, and he offered to arrange for me and my sister to visit them. The implication was that maybe they could be induced to admit my sister even though she didn't quite meet their usual standards—nothing dishonest, just a discretionary decision. We decided not to do it. My sister didn't care one way or the other, and my theory was that you shouldn't go to a school where the predictors indicate that you'll be near the bottom of the class. You should select a learning environment that's not too easy but also not too tough for your aptitudes, a golden mean where you'll be challenged but will feel successful if you work hard. That's why I wouldn't want my sister to go to a school where she only got in because she's a softball star or a professor's sister. Shouldn't blacks look at it the same way? If affirmative action is good for black students, then is it also good for an athlete or the sister of a professor or a politician to go to a school where she doesn't meet the usual admission standards? Is that the way to get a good education?

MORT: What you're overlooking is the fact that, according to reports I've seen, the Law School Aptitude Test is only thirty percent accurate.

SARAH: What does that mean, Mort?

MORT: It means that lots of people do better than predicted.

SARAH: And worse. So my sister and I had to take account of the possibility that instead of being only one notch below her classmates she would be two or three notches below. That downside risk was at least as important as the possibility that she'd do better than predicted.

NORMA: If Swarthmore was a better school, she should have tried to go there. I think you should go to the best school where you can do adequate work. It's a fact of capitalist life: Your degree will be worth more.

ANN: Getting back to Bernie's point about the dangers that specially admitted students face, I wonder whether we should tell them frankly about it in the acceptance letters.

THE DEAN: I don't think that would be wise, Ann. We can't very well say, "Welcome to our law school, and by the way, you're in great danger here." I think that most of them are aware that it will be a challenge.

BRAD: It occurs to me that Sarah's argument could be turned around. If it's true that you're better off at a school where you're average, then what about people like Bakke? The Bakkes who lose out on admissions here would be among our weakest students, and after we reject them they will go to lesser schools where they'll be more likely to shine.

BERNIE: And what about the minorities?

CHARLES: I think that the Committee's proposal takes us in the right direction: Diversity is the only legitimate nonacademic criterion. I don't think that race as such should be a factor in our admissions.

MORT: Don't you even think it's relevant?

CHARLES: No.

MORT: I don't see how you can take that position. I've been on the Admissions Committee, and when we got to the deferred group we looked at everything: I remember a guy we admitted because he wrote a book about bees, and a woman who had been a high school teacher.

NORMA: Nobody complains about "reverse discrimination" when a musician is admitted ahead of a non-musician, or an athlete is admitted ahead of a non-athlete. It's only when blacks are admitted ahead of whites that cries of injustice go up, and everyone pretends that the normal admission process is objective. Race is more relevant than any of the subjective criteria that have always been used.

BERNIE: Sure, but just about any criterion is arguably relevant if you're only using it to break ties—you could pick someone who was in the Coast Guard, or you could flip a coin. We're not talking about that. We're talking about very large differences in grades and aptitude test scores. So it's misleading to discuss whether race is "relevant," as if we were only planning to consider it in extremely close cases. If they prosecute me for murder, it's relevant that the murderer was short and fat and so am I, but that doesn't mean that the jury should give it much weight. I would treat musicians and athletes exactly the same as blacks: They wouldn't get preferential treatment except maybe where we're choosing between people with approximately equal credentials. Even in that situation, a lottery might be better.

PHILIP: Could the committee spell out what it means by "disadvantaged?" Are Asian-Americans included?

BRAD: I think it's fair to say we were of two minds on that. On the one hand, many Asians have done very well and so we wondered whether they belong in the program. I understand that some affirmative action programs do not include them. We decided that on balance they should be included because they qualify under the diversity rationale even if they might not qualify under a more purely redistributive rationale. Does anyone on the committee care to comment?

KEN: Many of us feel that Asian-Americans have not been brought sufficiently into the American mainstream. In addition, some of them are very poor—Hmong tribesmen from Vietnam, for example—or have severe difficulties with English

BERNIE: That's what I mean by ridiculous. You say that difficulty speaking English entitles you to preferential treatment. Your idea is that from the pool of people whose academic qualifications for this school are—so far as we can tell—very marginal (the deferred group), we should select for admission a subgroup consisting of those whose records show additional reasons for doubting that they'll do well—like that Eskimo woman we admitted a few years ago because it sounded neat to have an Eskimo in school, and then she flunked out, so we put her on probation, and she flunked out again, so we gave her one more chance, and then finally we got rid of her, after listening to a pathetic petition. We tortured her for two years, and then tossed her away. Is that your idea of doing a favor for disadvantaged people? She might have made it if she'd gone to the right school in the first place.

THE DEAN: Actually, Bernie, our flunk-out rate for minorities is quite acceptable these days, although we did have some difficulties during the early years of the program. Many of them graduate with honors. Any further discussion?

BERNIE: Of course, when we report on the performance of minorities we lump them all together, so that Asian-Americans inflate the record. But when we talk about the need for the program, we separate the minority races and start talking about the black underclass. That isn't very consistent.

PHILIP: I'm still not quite sure what we're doing here. If we admit Asians for diversity, would a medical school or a college in California exclude them for the same reason? I mean if they've become twenty or thirty percent of the student body.

NORMA: There's a big difference between excluding people by race and admitting them by race.

BERNIE: I don't see why: when you admit someone because of

his race, you're necessarily excluding someone else (who would otherwise have been chosen) because of his race.

BRAD: But there's a difference in terms of stigma between directly excluding a race and adopting policies that indirectly have that effect.

BERNIE: That depends. If you had a quota to keep down the number of people from every highly successful race, and announced that that was the reason, I don't see why that would stigmatize them. They would be against it, obviously, but not because it would stigmatize them. It wouldn't have to be like the Jewish quotas in the old days, because it wouldn't necessarily reflect racial animosity on the part of the decisionmakers. Theoretically, at least, they might devise a quota for their own race or races. If the Harvard Law faculty adopted a Jewish quota today, why would that stigmatize Jews? The rich aren't stigmatized by the progressive income tax. A Harvard or Yale quota on Jews would promote diversity and also group equality. I'm not saying it's politically feasible, but in principle it's the same.

NORMA: No, it isn't. The differences are obvious: your hypothetical quota would discriminate against Jews, who have been victims of discrimination, in favor of Anglo-Saxons who have been perpetrators of discrimination.

BERNIE: I thought we were talking about a diversity program. If the purpose of the program is diversity, why are the contours of the program shaped by classifications of groups on the basis of who discriminated and who didn't?

NORMA: Because, as I said before, we're talking about groups that are *both* victimized and underrepresented.

TOM: Point of information: Have we been preferentially admitting foreigners?

THE DEAN: You mean whites? I don't think there's been any policy on that.

BERNIE: My recollection is that our university's guidelines don't allow us to count foreign blacks under our affirmative action for faculty. So it's hard to say we're motivated by diversity. From the diversity standpoint, they'd be better than American blacks. Why isn't "diversity" just as important on the faculty? We talk about faculty "diversity," but it's just a code word for hiring American racial minorities. Nothing more. If we really want diversity, why don't we hire Christian Fundamentalists—or maybe someone like Bork?

JERRY: We have to have *some* standards, Bernie.

THE DEAN: Let me remind the faculty that we have a motion

before us. I don't want to shut off debate, but we're getting pretty far afield.

BERNIE: Why is it "far afield" to ask why the faculty adopts contradictory policies?

THE DEAN: You had your hand up, Milton?

BERNIE: I'm sorry, but I don't think my question has been answered. If we interpret the *Croson* case as prohibiting straight racial criteria in admissions, what about faculty hiring? Wouldn't it, by the same logic, prevent us from making an offer to a minority or a woman on a preferential basis, unless it's part of a more general diversity program?

BRAD: Realistically, who's going to sue us about that?

BERNIE: What kind of answer is that for a law professor to give?

TOM: He's not a *law* professor: He teaches Jurisprudence and Constitutional Law.

MILTON: I think we're losing sight of the most basic fact: Without affirmative action, we would have hardly any minorities in the student body. Now you can nitpick all you want, but that's the bottom line. We tried a so-called "merit" system, and it didn't work.

BERNIE: Excuse me, when did we try it?

MILTON: Before we had affirmative action.

BERNIE: But we had affirmative action within less than twenty years after *Brown v. Board of Education*. When you consider that compliance with *Brown* was very slow, there really wasn't a period during which the country tried a color-blind policy.

BRAD: The fact remains that if we abolished affirmative action today we would have almost no minority students.

BERNIE: We'd have some of Harvard's and maybe Cornell's.

BRAD: Not many. My information may be out of date, but as I recall only a minuscule number of blacks nationwide meet our regular admission standards.

BERNIE: Be that as it may, most of our minority students could still get law degrees somewhere without affirmative action. They would go to a law school where many of them were predicted to be in the middle of the class or better and where they wouldn't be the slowest students, and would have the satisfaction of having made it on the merits and of getting decent grades and of understanding what's going on—what a tragedy!

BRAD: I'm not sure you're right about that. In any event, you're forgetting that somewhere down the line we come to the bottom group of schools. Those schools don't have as much scholarship money, so poor blacks might not be able to go there even if they

were admitted. Besides, if those schools take our minorities, then they won't have room for the minorities they're now taking and there'll be a large net loss of minorities in the legal profession.

BERNIE: So they'd have to become grocers or insurance salesmen for a generation or two before their descendants went to law school. Why is that alarming? Why's that any different from what other races did? We still haven't got any Italians or Poles or Greeks on the faculty.

BRAD: I guess where we differ is that I don't think the analogy between blacks and other ethnic groups holds. I'm usually not one of Lyndon Johnson's biggest fans, but I think he said about all that needs to be said on this issue: When someone has been shackled for centuries, and you unchain him, you don't get true equality or fairness by immediately moving him to the same starting line as everyone else. There has to be a transition period before he can be expected to compete on a fair basis. As a debater's point, you can compare blacks with Italians, but to lump the experiences of Italians and Jews and blacks together by calling them all "discrimination" is like lumping homicides and fistfights together under the label "violence." There's a vast difference between the polite discrimination Italians and others faced, which didn't tear their families apart, or deprive them of opportunities to acquire commercial skills, or stigmatize them as totally loathsome, and the unique black experience of slavery followed by segregation, discrimination, and even terror.

BERNIE: If that's the justification, what about the other groups covered by this program? Was the Mexican experience unique too? And the Korean and the Vietnamese? I don't see how you distinguish those people from white ethnic groups. Why should a kid whose parents were middle-class Mexicans be admitted ahead of a kid with better test scores whose parents were Cockneys? Why should a Vietnamese whose parents own a restaurant get preferential treatment over a better-qualified guy descended from someone in a penal colony in Georgia? There's a wealthy couple in my neighborhood—Ted and Mary Stavopoulos—who have four kids of their own plus a Korean orphan they adopted. He's a very smart kid, with rich adoptive parents. Compared to most white kids, he lives like a prince, but nevertheless he's eligible for affirmative action. If he eventually has kids of his own, they'll be eligible too—even if their mother is a Rockefeller. Why should we assume they've suffered from discrimination, or their ancestors did, but an Irish or Italian Catholic or a Jew or a lower-class Anglo-Saxon never did?

BRAD: Don't blame the Committee; blame the Supreme Court. If diversity is the only permissible basis for our affirmative action program, then we have no choice but to include Asians. We could justify excluding them if the rationale of the program were economic redistribution, but the Court won't accept that rationale. So unless we can show that middle-class blacks have more unusual perspectives in class than middle-class Latins or Asians, all those other groups must be included in the program.

RICHARD: That's a bit disingenuous. Those groups were in the program from day one: It wasn't a question of trying to comply with *Bakke*.

BRAD: Nevertheless, we now have no choice.

NORMA: I hardly know where to begin. In the first place, it's absurd to compare blacks and Jews. Their whole historical experience is radically different, and yet everyone who attacks affirmative action talks as if blacks are just lazy bums who ought to get busy and do everything Jews have done. It's the most superficial analogy I've ever heard. Jews have thousands of years of experience and success in commerce and the professions. The next argument is that we're discriminating against poor whites, or being inconsistent by not having them in the program. Personally, I think it would be a good idea to have poor whites in our affirmative action program. Under the Committee's proposal, some poor whites could be admitted, and I'm sure that we would love to get Bernie's Cockney. But there are a lot of injustices in this country, and we can't correct all of them at once. All right? I don't think we should feel ashamed of feeling guilty about the things that have been done to minorities in this country; I think we should feel ashamed if we *don't* feel guilty. By Bernie's theory, the West Germans shouldn't give reparations to Israel, and Congress shouldn't have compensated Japanese-Americans for their internment. If we're going to talk about anomalies, what about the anomaly of compensating the Japanese-Americans and then not compensating the Black-Americans, who suffered much more severely? Congress didn't say, "We didn't do it; FDR and his generation did it." We accepted responsibility for internment of the Japanese, even though most of us weren't personally involved and maybe weren't even alive then, or were alive and opposed it. The West Germans didn't say to the Israelis, "We didn't do it; Hitler and that generation did it."

BERNIE: The Japanese reparations program is different: The only people who got benefits under that program were the ones who were personally harmed. So it's like giving each slave some public land when you free him. What we're talking about are descendants of

slaves, on one side, and whites who didn't have anything to do with slavery on the other side. Do the Egyptians today owe reparations to blacks because of what Arab slavers did? Does Ralph Nader? He's an Arab. They killed the old Africans and the children, and marched off with the rest. Most of them died.

NORMA: I wouldn't mind if they compensated Africans for that. Maybe they should.

BERNIE: But Arabs are part of the Third World. Aren't they eligible for preferential admission under our diversity program? What's the difference between a Lebanese like Nader and a Peruvian or a Mexican?

JERRY: Watch out, Norma! His next hypo will be a Saudi Arabian arms dealer.

BERNIE: Actually, it was going to be Arafat.

BRAD: I suppose as a law professor I shouldn't object to unrealistic hypotheticals, but I'm pretty sure that we haven't had any applications from Palestinians.

BERNIE: We had an Indian. I mean an Indian from India. Her father was a professor. She was very smart, and maybe she was a regular admittee. But I assume she was entitled to preferential admission and a preferential scholarship. Why . . .

THE DEAN: This is an interesting discussion, and I don't want to inhibit anyone, but I wonder whether we could get back to the main issues. Once we establish the nature of our program it will be easier to deal with some questions at the margins. In the meantime, however, we have to define our basic objectives.

BERNIE: All right, I'll talk about Anglo-Saxons for a while. They're pretty basic. I don't see why someone who was born in 1966 is guilty of slavery or internment of Japanese. That's like saying "the Jews" told Pilate to execute Jesus, or "the Japanese" bombed Pearl Harbor. That's racism. If you believe in collective guilt, I don't see why you think it was wrong to intern the Japanese-Americans: They had as much connection to Pearl Harbor as I have to slavery.

NORMA: Is that sort of snide remark all you have to say about what this country did to Native Americans and Afro-Americans?

BERNIE: Don't get me wrong: I can understand if a group decides that there's a stain on their honor, and to get rid of it they agree to pitch in and offer reparations distributed according to the tax laws. If Boris Becker wants to tax himself to pay the Israelis, so he can feel proud of being a German, that's fine. That's different from some World Court or World Faculty saying he's obligated to

do it, and giving a preference in the next tennis tournament to an Israeli over Becker.

NORMA: You're trivializing it.

BERNIE: The principle is the same. The point is, our affirmative action program isn't analogous to reparations to Japanese who were interned, or to Israelis by West Germany.

HERB: What about Indian land cases? Our law awards compensation as a matter of legal right to tribes for land taken generations ago. So we tax people who had nothing to do with driving the Indians off their land, and whose ancestors may not have arrived here until 1920 or 1940, to pay Indians who weren't personally and directly harmed, but who were presumably harmed indirectly.

BERNIE: The tribes are recognized legal entities, like corporations. In the eyes of the law, the party that was harmed is being compensated.

BRAD: Aren't you getting a little technical?

BERNIE: I don't object to a democratic decision by the people of the United States to compensate the Indians by taxing ourselves in accordance with the regular tax laws. That's like West German reparations to Israel; it's not analogous to affirmative action in university admissions. We're not sacrificing ourselves to regain our honor; we're making a scapegoat of people like Bakke so we professors can feel righteous. Why should those people be the ones who pay the cost of this program? Why shouldn't we pay it? I don't see any of us resigning in order to make room for minorities on the faculty. What if the Germans had said to the Israelis: "We feel terribly guilty; here, please accept Yugoslavia as a token of our remorse."

BRAD: I think that's too simplistic. We're not the only decision-making body involved in this issue. It so happens that we have jurisdiction to deal with certain things like student admissions and faculty hiring for our school. Our decisions on affirmative action may not apply to us, but some other faculty might hire a minority instead of one of us. So we're affected too.

NORMA: It's too bad some people have to be excluded on account of this program, but that's the way everything works: some people have to go off and get killed in wars and some don't; some have to be unemployed so that capitalism can work and some don't. Those people are also innocent victims, but nobody says it's too great a price to pay.

JERRY: Except Norma.

LEON: I don't think we should hold this program up until it is enacted by people who are totally devoid of selfishness or hypocrisy.

If that's the standard, just about all laws are suspect—including the first-year curriculum. Maybe the senators who declared various wars would've been less belligerent if they had known that they'd fight in the front lines, but until someone finds a better way to decide about war we'll just have to accept that weakness of the system.

BERNIE: But you'll agree, won't you, that it would be unjust if, in order to compensate the Native Americans, we simply gave them Wyoming, and kicked out the white people in that state because we'd rather do it that way than by taxing ourselves?

LEON: Of course.

BERNIE: Well, I think that's analogous to affirmative action. We feel sorry for poor blacks, but we don't want to tax ourselves to help them, so we sacrifice Bakke instead.

LEON: That analogy might be valid if our program were limited to poor people, but since it's designed to help all economic classes of minority students, and poor people only indirectly, there isn't any way we could achieve the same effect more equitably through taxation. Justice is doing the best you can: The reason the Wyoming example is unjust is that there are fairer ways to deal with the problem. If veterans' preferences are a bad idea, it's because there's a better way to compensate servicemen.

BERNIE: We could tax all whites and pay all blacks, or all blacks who want to go to law school.

NORMA: But since most of them don't meet the regular admissions standards, that wouldn't diversify the legal profession.

LEON: And it might not be politically feasible.

BERNIE: What makes it politically feasible is what makes it unjust.

LEON: No more than other political programs.

BERNIE: Other programs are enacted by the legislature. Why don't you try to get racial criteria enacted by the legislature?

NORMA: If the legislature disapproves, it can overrule us. Anyway, Congress *has* approved racial set-asides that are more direct than the Committee's proposal.

BERNIE: Since our real motives for affirmative action are political rather than educational, we won't have any principled basis for objecting if the legislature ever decides to start imposing political standards on us. Our independence has been based on the idea that we're just setting educational policy.

NORMA: What independence?

BRAD: I'd like to remind the faculty that, although there's been a good deal of talk about race here today, our proposal does not call for a racial criterion. It calls for a diversity criterion. The Commit-

tee believes that—whatever one may say about race and group rights—our diversity proposal makes educational sense. In every law school course, there's a need to get away from exclusively white-male perspectives. Listening to minority viewpoints and experiences is a valuable part of the learning experience for our white students, especially those who will be judges or politicians someday.

BERNIE: No matter how much you talk about diversity, the main operative meaning has to be race, or else you won't get "enough" minorities. If you really adopt an honest diversity standard, and start looking for people who've been poor, or who've been firemen, or who've lived abroad—no matter what you look for—you'll get mostly whites because of sheer demographics. So "diversity" is just a cosmetic reason.

BRAD: I think that's too cynical. You can have a diversity standard that takes account of several factors including race and geographical diversity, just as Harvard favors both racial minorities and people from Idaho. I don't think that that's merely "cosmetic." In college, I roomed with a fellow from Canada, and I think I benefitted from that.

BERNIE: Look: If Harvard really admits people from Idaho who have grades and SAT scores that are extremely far below the New Yorkers they exclude—which I'm not at all sure they do—I think that's a mistake. But if a private college wants to make a mistake that's their right. We're a state institution, and I think we have certain obligations that they don't. Look at religious colleges: They're private, and they ought to be allowed to discriminate in favor of their religion. But that doesn't mean a state university should do it.

BRAD: A state university needs a student body with diverse viewpoints just as much as a private school does. It improves the learning experience.

BERNIE: "Diversity"—in the sense of a greater variety of viewpoints—is a rationalization that was dreamed up because we were afraid the Supreme Court wouldn't approve of our real motives. In this context, "diversity" means race—plus whatever we do to avoid losing lawsuits. We don't want minorities because we want a variety of viewpoints; we want them because of their race. I'll bet that if I taped my Contracts class, and had a transcript typed up, you couldn't tell me which of the comments were made by blacks or Hispanics, let alone Asians. I've been in the faculty lounge as much as anyone, and I've never heard a colleague mention an insight that a student contributed on the basis of racial expertise. If it's happening, it sure doesn't seem to impress us. Let's face it: With very rare

exceptions, black law students say the same sorts of things as white students of comparable ability. I've also been to dozens of faculty meetings on appointments and admissions, and I've never heard even a single professor bemoan the lack of diverse viewpoints on the faculty or in the student body. Nobody has ever said we need more conservatives or Southerners, for example. If we had political diversity, we'd complain that we were getting "factionalized." Our ideology says diversity is good, but our hearts say peace and quiet is better.

BRAD: That's too extreme. Right now the Appointments Committee is considering a law-and-economics scholar, which is one kind of diversity. But getting back to student admissions, let's not forget that we're also talking about the minority students' potential contribution to the legal profession.

BERNIE: Which is conveniently impossible to measure.

BRAD: I don't think we need to measure it exactly, in order to conclude that the legal profession ought to reflect—to a greater degree than it does—the ethnic diversity of American society.

BERNIE: Why should it? The faculty doesn't. We're about as unrepresentative a group as you could find—in terms of class, politics, race—you name it. We're about ninety percent liberal; one hundred percent upper-middle class or above; thirty percent Jewish; and one hundred percent native born. Nobody on the faculty has ever been a businessman, a professional soldier, or lived in a communist country or been on welfare.

JERRY: Or practiced law.

BERNIE: Everybody who talks about it in the lounge is against capital punishment, in favor of abortion, and also the Equal Rights Amendment, day care, gun control, abolition of school prayer, the exclusionary rule, more environmental regulation, constitutional protection of flag-burning, less military intervention abroad, the latest Democratic presidential candidate, and legalization of homosexuality. This is diversity? There's more diversity in the Marine Corps. Most of us don't even know a Christian Fundamentalist, or a poor person of any persuasion. I can't imagine us hiring a black professor who was an outspoken conservative when we interviewed him. For diversity, he'd do more than ten black liberals. We're a one-party law school in a one-party university. As far as I can see, we like it that way. Real diversity would scare us to death.

BRAD: I don't agree with your analogy between faculty diversity and student diversity. Professors are a very specialized group. Lawyers are part of the leadership class in our society.

BERNIE: Then why aren't the people who train them? Besides, if

the point of "diversity" is to exchange ideas, and enlarge everyone's perspective, you would think that professional thinkers would need it more than anyone else.

THE DEAN: I wonder whether we're not getting off the track again. Faculty diversity is a legitimate concern, and perhaps the Appointments Committee should give it some thought, but we have a specific problem to deal with here, so if you don't mind, Bernie, I'd like to steer the discussion back to admissions policy.

BERNIE: I'm talking about admissions policy.

THE DEAN: I must have been hearing things. Any further discussion? I don't want to cut anyone off.

MARGARET: I don't necessarily disagree with everything Bernie is saying, but I don't think he takes account of the need for role models for disadvantaged students. If a white kid looks around, he's surrounded by models of successful white adults, who've reached the top in everything from politics to brain surgery to law. Black kids need similar examples, to show that you don't need to be white to be a successful lawyer or judge.

BERNIE: Why? Can't they figure that out for themselves? *We* knew that blacks could be lawyers, and we knew it without any study at all—way back before affirmative action. We just knew it. If you ask me, it's pretty insulting to assume that they can't figure it out too—it's just common sense. Listen to what you're saying: you're saying that a black kid who's smart and shrewd and ambitious enough to make a good lawyer, may nevertheless think he couldn't do it. Well, a white kid could have the same problem. If he's that dense, or that timid, I don't want him to be a lawyer. One of Felix Frankfurter's most important role models was Holmes. He didn't say, "Oh, Holmes is irrelevant to me because he's a Yankee."

NORMA: There you go again: "All blacks have to do is imitate Jews." It's a ridiculous analogy. There wasn't any question in Frankfurter's mind that Jews could be successful lawyers. He himself came from a prominent family in Vienna. We're talking about providing examples of career opportunities for a race that wasn't even part of so-called Western civilization until it was forcibly uprooted, and that's been systematically deprived of decent career opportunities. Black kids may think that all the great doctors and lawyers are white because they don't know any black ones. It's important to have people like Thurgood Marshall as inspirations for these kids, to show them that crime and undertaking and preaching and sports aren't the only careers for blacks.

BERNIE: What you're forgetting is that even without affirmative action the talented black students will get law degrees—not at the

same schools, but somewhere. Thurgood Marshall wasn't an affirmative-action student. He went to school before affirmative action existed. It was an all-black school, but today he'd be admitted to an integrated school without affirmative action. In fact I suppose that most of the minority students at our school today would have been lawyers without affirmative action. They needed preferential treatment to get into this school, but they didn't necessarily need preferential treatment in order to get into the legal profession. When we talk about role models *created by affirmative action*, we're not talking about the good minority students; we're talking about people whose college records and LSATs were so bad that without affirmative action they couldn't even have got into the worst law school in the country. If you've read any bluebooks lately, you can imagine what kind of student couldn't get into the worst school in the country. To put it mildly, these are not very inspiring role models. And there's no such thing as a free role model: If we make them lawyers, then they're unavailable to be role model engineers and dentists and business people. There isn't any field except sports and maybe entertainment where we can confidently say that blacks have more role models than they need. So I don't see that it's a big net gain to entice blacks away from other good careers to law even if they are role models. Why do they have to be lawyers? There's occupational specialization in every ethnic group. Is it so terrible if Chinese go into restaurants and medicine and science instead of law?

BRAD: I'll respond to that. I think you're ignoring the fact that lawyers play a unique role in our society. There's an enormous difference between the political role of lawyers and other occupations like dentists. Some lawyers may not be inspiring role models for you or me, but maybe they are inspiring for a poor black kid whose mother is on welfare.

PAUL: I think there's a lot of merit in the role model concept. I might not have gone into law except that my uncle, whom I admired, was a highly successful lawyer, and I idealized that. I don't think it's limited to race. I would favor preferential admission of a white kid from some backwoods county in Alabama, ahead of a New Yorker with slightly higher grades. I see affirmative action as an extension of that.

BERNIE: And hydrogen bombs are an extension of spears. We're not talking about admitting them ahead of people with "slightly" higher grades; we're talking about big differences.

PAUL: That's why I don't rest it entirely on the role model argument.

BERNIE: I can see that the role model theory makes sense for the first few black lawyers, but we're way past that. The role models will exist without affirmative action.

PAUL: I think that's simplistic. There's a big difference between a lawyer you never met and your Uncle Fred, or your big sister.

BERNIE: All right, but what sort of model will Uncle Fred be? If he's someone who couldn't have been a lawyer without affirmative action, then the role he's modeling isn't just "black lawyer"; it's also "black who needs preferential treatment." It seems to me the marginal advantage of extra black legal role models is outweighed by that negative aspect. I realize that Horatio Alger is partly myth, but the Protestant ethic is a myth that helps the people who believe in it.

JERRY: Except the Protestants.

NORMA: I don't mean this personally, but that's absurd. The Protestant ethic isn't the reason we've never had a black presidential candidate or secretary of state, or governor or senator or chief justice in this state.

PHILIP: I have a question: How will our diversity admissions program relate to our minority scholarship program?

THE DEAN: The fifty percent of our scholarship funds that we used to reserve for minorities will presumably be reserved for participants in the diversity program. Unless I hear a motion to the contrary, that is how I will interpret a favorable vote on the Committee's proposal.

PHILIP: Will that money be allocated on the basis of need?

THE DEAN: It has been on the basis of need within that group. They do not compete on the basis of need with regular admittees.

PHILIP: That's what I don't understand. Let's say we admit a white student with an interesting background—maybe he's an artist, or he was a policeman or something. Why should he (or she) have a better chance for a scholarship than a white student who's equally poor and had better college grades and was admitted under our "automatic" criteria?

BRAD: Originally the theory was that the minority special admissions program is a high-risk program, and so it seemed appropriate to grant scholarships on a more generous basis to compensate for the increased risk of failure. I suppose you could say that that rationale would still hold good under the diversity program, because the students—even if they're white—would be selected from a relatively high-risk group. Is that right, Mark? You were on the Scholarship Committee back then, weren't you?

MARK: I think the main idea was that if we don't offer good

scholarships we won't get enough minority students and therefore it's essential to the success of the program because of course they can always go to another school with better scholarships.

STEVE: It seems to me we can justify keeping the minority orientation of the scholarship program, on the ground that we're simply paying the market price. In other words, it isn't that we're discriminating against whites; it's just that we have to pay more to attract minorities to our diversity program than to attract whites.

THE DEAN: That's an interesting concept, Steve, but frankly, bearing in mind the possibility of a lawsuit, I think we'd be on firmer ground if we pegged it to need, and the higher risks that people of all races in this group must undertake. It won't affect the total cost of the program very much.

BERNIE: What "higher risks?" I thought you said that our minority flunk-out rate had reached an "acceptable" level. Are we bribing them to do something foolish?

THE DEAN: No, of course not, Bernie. If we considered it foolish we wouldn't have the program. Does anyone else have anything to contribute? The chair recognizes Norma, then Richard.

NORMA: I don't see any difficulty in justifying our scholarship program. Minorities are providing a service to the law school by enriching the educational experience. That makes them more entitled to scholarships than student athletes, who simply bring in money and don't directly enhance education.

BERNIE: That may be a good analogy to make to the regents, or the Supreme Court, but since I'm against athletic scholarships, to me the analogy cuts against you.

RICHARD: I don't know how I'm going to vote on this. I used to be against affirmative action. Then over the years I got to know many minority students, and that personalized the issue for me. They were human beings, and for some reason I usually liked them a little better than most whites. The Bakkes were anonymous, shadowy figures I'd never met, although I knew they were out there somewhere. So I decided I was for the program, with reservations. Now I'm beginning to wonder whether I should be against it, with reservations. I can't divorce this issue from larger questions about the role of politics in awarding scarce resources. I think we have to recognize that entitlement programs like this are extremely hard to reform even after thoughtful critics find great flaws in them—look at social security and farm subsidies. This particular entitlement has a rather attractive core idea: helping to educate members of two races—Indians and blacks—whose ancestors were savagely oppressed, and whose current economic position is at least relatively

terrible. But even at the outset other races that are harder to distinguish from some whites were covered by the program. And it is still expanding in dubious ways. It's not confined to education and it's not confined to blacks and Indians. The other day I read that the Detroit Symphony was pressured by black politicians into abandoning its old audition system, under which a screen prevented the judges from seeing the musicians who were trying out. They now have their first affirmative action black musician.¹⁵ We're doing similar things here in the law school. For one thing, I don't approve of selecting some members of the law review by race and sex. That wasn't part of the original affirmative action concept, but it came along eventually. Then when our Committee was considering proposals to revise the affirmative action program, the Gay-Lesbian Caucus testified that avowed homosexuals should be preferentially admitted. The Committee assured them that they would be treated as a disadvantaged group if the faculty adopted the new diversity standard, on the theory that gays need role models just as minorities do. So now a white homosexual activist will be admitted ahead of some white heterosexuals with better grades. The Committee agreed to that unanimously. The Caucus has also asked us to hire a gay professor as a role model for gay students. It's not clear whether a male gay would be an adequate role model for lesbians, so maybe that would eventually require two faculty positions. My old law review at Columbia now reserves positions for homosexuals. When you consider that gays have higher average IQs and income than the rest of us, I find it hard to justify giving them additional advantages, but we've already got race and gender boxes on the American Association of Law Schools resumes, and I guess sexual preference is next. Even if we accept Norma's two criteria—victimization and underrepresentation—it's not clear to me when and how we decided that homosexuals are severely underrepresented in the legal profession. It's also unclear to me why a relatively affluent group like gays needs proportionate representation in the legal profession. Why can't they hire "straight" lawyers? In 1989, it shouldn't be difficult to find heterosexual attorneys who treat them with respect and understanding, even who believe that homosexuality is just another lifestyle. If we focus on class discussions instead of the legal profession, why do we believe that the gay-lesbian point of view is underrepresented? Except on homosexuality itself, which is discussed maybe two or three times at most in law school, I'm not aware of any distinctively homosexual views on legal issues. In fact, if we're talking about a variety of viewpoints, I can't think of any

15. Blanton, *A Limit to Affirmative Action?*, COMMENTARY, June, 1989, at 28.

position homosexuals would probably take that isn't already the dominant position in the law school and university. Many homosexuals are ardent feminists, but so are many heterosexuals, and—in relationship to the general population—feminist views are over-represented rather than underrepresented in the law schools. Huey Long said that when we get fascism in America we'll call it "Americanism." Well, we're getting political uniformity in the universities, and we call it "diversity." In the early 1960s, before affirmative action, there was a broader spectrum of socially acceptable opinions in the universities than there is today, on any issue affecting minorities, or women, or homosexuals. I don't want to say *post hoc, ergo propter hoc*; there's probably a common cause. But every group that receives preferential treatment also happens to be disproportionately committed to the ideology that is dominant in the universities. What we've never stopped to ask is, why is diversity particularly appropriate in a university? Sidney Hook used to say CCNY was never as diverse as when it was 85 percent Jewish. His goal was diversity of opinion, but that isn't the real goal of our "diversity" program. Our goal is to redistribute wealth. Next will be handicapped people, presumably, and I'm not sure a blind professor would be an adequate role model for one in a wheelchair, or vice-versa. What about elderly people? Should we admit them preferentially? What about poor people? Are we middle-class professors adequate role models for them? These hypos may sound ridiculous, but forty years ago the whole program would've sounded ridiculous. Are Black-Americans adequate role models for Asian-Americans? What about tenure and promotions and faculty chairs? If we hire minorities preferentially, and don't give them preferential treatment at tenure time, then affirmative action is a trap for them. That's what happened to Ben, and in my opinion Lucille; although she was white, she was also hired preferentially because she was a woman and then she didn't get tenure because her article didn't meet our usual standards. (What did we expect?) If, on the other hand, we do give them preferential tenure treatment, are we prepared to be honest about it, and say so in our tenure standards, or will we lie to each other in our appraisals of their scholarship and teaching? Then if we also hire gays preferentially, will they also get preferential treatment on tenure? Or will we deny them tenure like Ben and Lucille? Wouldn't it be better to try to reduce the role of politics instead of increasing it? When I was at Columbia, I was an editor of the Law Review. I was from Georgia and most of the other editors were from New York and they picked a New Yorker instead of me to be Editor-in-Chief. They used to make fun of my

accent, and I spent hours in my room trying to lose my drawl—pretty successfully, as you know. The other students used to ask me whether my parents voted for George Wallace for president and were there any four-lane highways in Georgia and that kind of thing. I didn't have many conservative ideas, but you can bet your boots I kept the ones I had secret. Maybe I'm prejudiced, but I think I was the best qualified to be Editor-in-Chief. I think they knew it but they didn't care; I was an outsider. That was my first real experience of politics. Then eventually I started looking for a clerkship. Justice Black wouldn't take me because although I was a Southerner, which was one of his criteria, I didn't play tennis, which he wanted and anyway that year he picked the daughter of one of his old New Deal buddies. She didn't even make law review at Harvard. Then Douglas and Warren wouldn't consider me because they always took Westerners. Harlan wanted Harvard graduates who'd clerked for a year. Stewart picked a guy from my class who allegedly was the son of a friend. You may think that affirmative action is an antidote to this sort of thing, but from my perspective it's more of the same. I realize that some people—mostly white males—have always had more “pull.” So you can look at this as simply giving minorities the same unfair advantage that others have had, and still have. On that theory it sounds as if one group's political advantages offset the other's. Maybe they do, if you focus on groups. But groups are just abstractions; only individuals have feelings. No matter how collectivist you are, you ultimately have to justify it in terms of its impact on individuals. That's not “individualism”; it's just clear thinking. From the standpoint of individuals, I think this sort of thing is a further reduction in the number of positions that are open to a genuine competition on the merits. I don't like political criteria because I don't like to be reduced to a crude, hostile abstraction like “white male.” That dehumanizes me. I don't think that I should be treated as if I'm more like George Wallace than like Martin Luther King or Justice O'Connor. I don't accept categories that ignore my personality and behavior and label me as an Anglo-Saxon “perpetrator of discrimination.” That's discrimination against me; it just isn't the fashion in the universities to call it discrimination. Winston Churchill said democracy is the worst form of government—except for all the others. You could say the same about judging people by their test scores. The students are always complaining that law firms shouldn't pay so much attention to minute differences in grade point averages. If you just focus on that, they have a good case. But they never ask what the firms will do if they stop relying so much on grades. They'll presumably

rely more on the interviews instead. That may sound good if you're an impressive-looking guy whose grades aren't so great, but what if you've worked hard and got fairly good grades but you're ugly and quiet and stammer and wear a Sears Roebuck suit? Of course, the lawyers think they're experts at sizing up people, but I've read some of the social science literature on interviewing and I've seen us interview people for the faculty and I'm not so sure. It's the same when we decide who to admit from the deferred group. It's all very well to say that small differences in test scores don't prove anything, but you don't improve a plain cheese sandwich by adding Brussels sprouts. Instead of relying on slight differences in test scores, we rely on prejudice and stereotypes. Like thinking the daughter of a Greek-American rancher in Colorado is more interesting than the son of a salesman in Buffalo with an Anglo-Saxon name. The salesman's kid may be twice as interesting and deserving, but he doesn't fit somebody's stereotypes, so he is rejected.

NORMA: Richard's argument assumes that there's a merit system that is somehow uncontaminated by politics. I think that's naive: all selection systems are ultimately political. The Law School Aptitude Test is a political document.

BERNIE: Sure, and as Clausewitz said, war is an extension of politics. So the LSAT is germ warfare?

LEON: May I change the subject slightly? There's been a lot of talk about which groups should pay and which ones should benefit. As a question of theoretical justice, you can go on forever raising perplexing problems about that. It's an interesting question, for example, why we treat someone who has only one Indian grandparent as an "Indian." I had an "Indian" student who looked like my sister! It's a perfect topic for a seminar.

JERRY: If you don't mind, Leon, I'm going to let *you* teach that seminar.

LEON: Let's just say it's perfect for a ninety-page law review article that nobody except professors will ever read. We love to deal with issues at the margins, and at the margins most legal categories and doctrines become questionable—look at freedom of speech and pornography, for example, or the consideration doctrine. Anyway, my point is that we're not solving a tidy, abstract Platonic problem; we've got a very messy set of sociological and political realities. In real world politics, you don't get optimal solutions; you do the best you can. We're not usually dealing with simple justice; more often, we're dealing with complex justice, and complex justice involves some things that theoreticians dislike: for example, uncertainties about causes and effects, the necessity of bowing to political reali-

ties, and the necessity of hurting innocent people—draftees in the political wars. People get helped and hurt, not because it's "just," but—at best—because someone guesses it's the expedient way to achieve a larger good. There's been a lot of talk about whether this or that individual is guilty. It doesn't matter any more than it did when we bombed German cities; I'm sure we killed a lot of babies and pacifists in Dresden. If the danger of a Japanese invasion had been as great as many people thought it was, and if the danger of sabotage by some Japanese Americans had been very great, and impossible to deal with adequately in other ways, then the internment of all Japanese—innocent or not—might have been justifiable. All the talk about an inviolable principle of equal treatment of all races is sentimental nonsense. We only believe it in retrospect, or because we're irresponsible, which amounts to the same thing. If it wasn't politically feasible for the Court to abolish segregation in 1896, then *Plessy v. Ferguson* was decided correctly even though it was "unjust" to blacks. So I don't regard it as a fatal objection that affirmative action entails sacrificing some innocent white people. It's a high cost, but not necessarily too high. Not as high as all the suffering blacks had to endure while we forced them to wait for the opportune times to abolish slavery and segregation. The answer to the question of whether justice can trump utility is that it depends on how much utility and how much injustice. For me, the question is whether the benefits of affirmative action outweigh the harms to people like Bakke. In estimating those benefits, we've been overlooking what I think is the main rationale behind this program: the importance of giving minorities a stake in the system. I think it's a compelling national interest for them to be able to look around and see black and brown faces in positions of power. It's not an eternal truth; but it's today's truth, which is just as good. I won't deny that there are debatable categories like Japanese-Americans, but the basic idea is sound: Groups that perceive themselves as groups and that feel excluded need to be brought into the mainstream. We need some Hispanic William Brennans, and some black Derek Boks, and we can't wait fifty years for it to happen naturally. Bernie or someone talked about Irish and Italians. It's not the same. Not today. For one thing, none of the white ethnic groups is conspicuously poor anymore. For another thing, the white groups are dissolving with intermarriage and the decline of strong religious beliefs. When I look at Justice Scalia, I don't think "he's Italian." Not at first anyway. With blacks, you can't help it: The first thing you think, with all the good will in the world, is "he's black." I remember in 1960 somebody said that at President Kennedy's inau-

guration there ought to be some black faces, to show that it's their president too, that they have a stake in the system and not just whites. You can express this idea in ways that sound offensive, like "placating the masses," but it doesn't have to be put in those terms. I prefer to say simply that it's good for all of us if minorities feel it's their country too. Everybody gains, in wars and peacetime too, if there's a feeling of patriotic solidarity, of community. We have it to some extent in the universities, but not in the larger society. I think that's why we need affirmative action, although I agree with Bernie that if it's carried too far it gets ridiculous.

BERNIE: I didn't say that Italians and blacks are in the same position today; I said that blacks are in the same position Italians used to be in.

LEON: But in those days Anglo-Saxons could afford to ignore the feelings of Italians. The world has changed, and there are a lot more people with colored skins than with Italian ancestors.

BERNIE: Your justification, and the role model justification that various people have offered, are both invalid under the Court's holding in the *Croson* case. Your arguments are just as applicable to business set-asides for minorities as they are to university admissions, and yet the Court struck down business set-asides except if they are established by Congress. So the only possibly valid rationale for upholding preferential admissions is something like diversity which is arguably more persuasive in the academic context—but only if it's a genuine diversity program, related to the educational mission, which in reality it isn't and never will be, because academics don't really want political and cultural diversity and no court can monitor us closely enough to change that.

LEON: The way I see it, diversity is a legal requirement we have to meet. That doesn't mean it has to be our main motivation. The legal requirement is met by certain results, regardless of motivation. As long as we produce whatever results the Court requires, we can adopt the program for our own reasons. One professor might vote for the program because he's afraid of the dean, and another might feel guilty about being white—it doesn't matter, provided that we do what the Supreme Court requires. As I read Powell's opinion, we must admit some white students from time to time under our program. The Committee's proposal contemplates that. I think Justice Powell's diversity approach probably was very statesman-like. It isn't my motivation, but as a legal standard it sounds better than race and it's even partly true, which is as much as you can say for most great legal principles. Sure it's euphemistic, but that's not always bad. If everybody were completely candid, we'd be calling

each other names and fighting constantly. Politics is mostly euphemisms, when it isn't outright lies.

RICHARD: What worries me is that we seem to be drifting toward a system where everything is treated like a New York City political ticket: the Catholics get their spot, the Puerto Ricans get their spot, the homosexuals get their spot, the women get their spots, and so on.

LEON: Sure, that's a danger, but it's also a danger that "the power to tax is the power to destroy." In the early 1900s, some conservatives thought that the progressive income tax was going to lead us to socialism, but of course it didn't. There's been less affirmative action than you might expect, given the way nearly all of us professors—and even George Bush—pay lip service to it. It's like censorship: depending on your angle of vision, it looks pervasive or extremely rare. Holmes used to say that we should "think quantitatively instead of dramatically." He was criticizing socialists for ranting and raving about the lavish living styles of the super rich, but the same criticism could be made of conservatives. Most discussions of this subject by conservatives are dramatic, like the discussions of censorship in liberal journals. They pile up horrible real or hypothetical examples from all over the country. To think quantitatively, you have to stick to one occupation in one area at a time. Look at law school teaching: there's all sorts of noise about affirmative action, but there aren't many tenured blacks. One reason is that the opposition has gone underground: even most of the conservatives talk as if they accept the concept of affirmative action, but then they usually argue that particular candidates are unqualified. We haven't got a single black professor here, but to hear us talk you'd think there were dozens. We've got affirmative action in admissions, but last year I had only two black students out of fifty, in my Torts class. I have a hard time seeing how that's a slippery slope leading to social disaster.

BERNIE: Well, if you want to talk quantitatively, let's say that almost everything Nixon did was legal. These are moral issues: we're not talking about cement production. Brandeis said that the law is the great teacher. Say what you like about a color-blind policy; the fact remains it was inspiring. It was a great, clear, simple principle that ordinary people knew was just, even sometimes when they violated it. It didn't need a euphemism, like "affirmative action," because people weren't ashamed of its meaning. Affirmative action teaches people that their race is the most important fact about them. It's their meal ticket, and the proof of their claim to moral stature. If you're trying to get patriotism, that's exactly the

wrong approach: From a racial point of view, many of us can identify more closely with a foreign country than with the United States. It's only by treating race as incidental that we have any basis for patriotism and communal feelings in a multiracial society. Maybe affirmative action makes some sense in a country like France, where there's a racially-cohesive, dominant majority and relatively small pockets of extremely weak minorities. But in this country there are several groups that could plausibly be treated as victims, or as too powerful, or as neither: Jews, Asians, Irish-Catholics, and poor Anglo-Saxons, for example. In our society, the most divisive thing you could possibly do is to teach everybody that it's unjust for one group to have a higher average income than another, or to be "over-represented" in some occupation. Once the media and the educators accept that premise, as I'm afraid we have, then we have a perfect formula for perpetual dissatisfaction. It makes racial shares and lists of victimized groups and "perpetrator" groups a permanent political issue, and like all political issues it'll sometimes be resolved in ways we don't like. When we like it, some other segment of society won't. Why are we so sure that we won't end up like Malaysia, where they have "affirmative action" for the *majority*, to reduce the economic dominance of the Chinese minority?¹⁶ NORMA: If law is a "great teacher," then abandonment of affirmative action would teach that whites no longer accept even part of the responsibility for what has happened to minorities in this country. You would be telling minorities that you don't want them in our top universities. You can shake your head all you want, but that's how it would be interpreted: "We've tried having you minorities around, and we've decided we don't like it. We want you to go off and read Horatio Alger books, and listen to George Bush's homilies on TV, and learn to be carpenters."

BERNIE: Don't get me wrong: I'm not against appointing people partly on grounds of race or sex, to political positions where everybody is being appointed partly on some sort of political ground. Mary Juneau was one of the brightest students I ever had. She became a staff lawyer for the state Transportation Department. Then the Governor announced that the next person he appointed Commissioner of Transportation would be a woman. He interviewed six or seven and chose Mary. In a sense, that was an affirmative action appointment, but Mary was twice as smart as anybody else the Governor ever appointed. If he hadn't picked her, he would've picked one of his male cronies, the way he usually does. So in that type of case a racial or sexual criterion is just an alternative to an-

16. R. KLITGAARD, *supra* n. 2, at 168.

other political criterion, and it may actually improve the choice. That's why I don't mind appointing someone to the Supreme Court because they're a black or a Southerner or a woman. It's no more political than picking someone who helped you in your presidential campaign.

LEON: Fair enough, but we're talking about a major, national problem. A few political appointments here and there aren't enough. What you're overlooking, Bernie, is that blacks are already group conscious, and it didn't begin with affirmative action. They firmly believe that disparities in group incomes are due to discrimination. It may take affirmative action to convince them that they aren't being discriminated against.

RICHARD: But we've already got affirmative action, and it doesn't seem to have that effect. Every time I turn on the TV news someone is talking about discrimination. When the Supreme Court decides that blacks or some other group aren't entitled to preferential treatment, all sorts of politicians and civil rights lawyers and columnists and Harvard Law professors go on TV to say that they've dealt a crippling blow to "civil rights." The culture of affirmative action has redefined civil rights as equal outcomes among racial groups, and that definition changes a soluble problem—discrimination—into an insoluble one.

BERNIE: The indignation industry doesn't want soluble problems; they're bad for business.

MORT: Richard and Bernie have been making two main arguments that I think are inconsistent with each other. On the one hand, they argue that in another generation or two—without affirmative action—blacks will catch up just as white ethnic groups did. On the other hand, they also argue that affirmative action will last forever. If they really do catch up, it shouldn't be hard to end the program.

BERNIE: It'll be harder to end it than to expand it to include the groups that feel aggrieved by it. That way, the minorities won't be angry, and whoever has become resentful will be appeased. It's already happened at CCNY, where they've now got affirmative action for Italians.¹⁷ The losers will be individuals who don't belong to some cohesive group. The veterans' preference laws are a good example: Instead of repealing them, we cite them as precedents for affirmative action. If we were discussing freedom of speech, we'd see slippery slopes leading from minor exceptions to widespread repression; we'd talk as if precedents breed like rabbits and adminis-

17. Hacker, *Affirmative Action: The New Look*, N.Y. REV. OF BOOKS, Oct. 12, 1989, at 63, n.3.

trators are inevitably idiotic fanatics. But when we discuss affirmative action, the precedents are always easy to confine and the administrators are always wise. The mistake that underlies this program is the idea that all whites are fungible, so racial minorities are the only ones to appease. You're assuming that the lower-middle-class whites who get bumped to make room for blacks won't be just as resentful, and just as dangerous, as the blacks who wouldn't have gotten in without affirmative action. Maybe it looked that way in the 1960's when blacks were burning down cities, but today there are plenty of resentful whites. If you're really worried about social stability and legitimacy, the dangerous people are the yahoo whites rather than the blacks; there are more of them. I don't want to sound melodramatic, but I worry a lot more about those people taking power in some depression or war than I do about the way that poor blacks used to burn down cities.

NORMA: Blacks are still burning down cities—look at Miami.

BERNIE: In the nineteenth century the Irish immigrants rioted. Did you know that? The urban lower class always behaves that way occasionally; in England they do it at soccer matches. Besides, we've had affirmative action for about twenty years, so if racial tensions are still a problem, why is that an argument for affirmative action? Why isn't it evidence that affirmative action doesn't work? The country has been electing Republican presidents who scornfully attack liberals. Why is it that liberals and the American Civil Liberties Union have become objects of derision? Maybe affirmative action is one of the reasons. I don't mind all these Republican presidents, but I'm surprised it doesn't bother you, Norma. I think that the average guy sees through all our talk about how harmless it is for the white majority to discriminate "against itself." Let's face it: nobody (except maybe Mother Teresa) discriminates against himself. Affirmative action isn't whites discriminating against "themselves"; it's secure, elite white politicians and professors and bureaucrats discriminating against ordinary whites. Try to find ten white truck drivers or secretaries who believe in affirmative action. We've taught them to be political about getting ahead, so now—at least in Louisiana—they're organizing like other racial groups. You can call them racists, and maybe some of them are, but what they're doing is perfectly logical. They're getting ready to play the game by the rules we've been writing. Do we expect them to fall for the idea that they belong to the same race as we do, so they should be pleased that *we* made it? They may be racists, but they're not racist enough to believe that.

NORMA: That's the same scare tactic that's always used to oppose

civil rights. The rednecks didn't become political because of affirmative action; they were political as soon as the slaves were freed. If we'd let white racists scare us off, we never would have had any civil rights progress. We'd still have slavery because we were afraid to make John C. Calhoun mad, and school segregation because we were afraid of the Klan. I think all this talk about discrimination against whites is sheer nonsense. It boggles my mind. We have a rich white president and a rich and ridiculously unqualified white fraternity kid vice-president, and a rich white secretary of state, and a rich third-rate actor white ex-president and a Senate full of white millionaires, and faculties that are almost totally white, and on and on and on. And every last one of these whites is a heterosexual male. That's your "merit" system. You're telling me that some black woman who lives in Newark should identify with these white men just as much as the good old boys in Arkansas do? You've got to be kidding. For centuries blacks were enslaved and lynched and discriminated against, and nobody complained about that, but now if anyone proposes even a slight amount of corrective justice, howls of "discrimination" and "judicial activism" go up. Black progress is fine, provided that it doesn't hurt anyone's sensibilities or conflict with some principle that somehow never seems to prevent whites from getting what they want.

RICHARD: I agree that it's a problem, a terrible problem, that so many of the upper ranks of our society are lily-white. I don't doubt for a moment that it causes bitterness among blacks, and rightly so. Most of our parents were against racial discrimination, but weren't disturbed much by the fact that the urban slums are black and the mansions are white. But it bothers me. I can't tell you how much it pleases me, when I go to an expensive restaurant, to see a black couple there too. Many of us whites have inherited large sums of money. We don't consider them large, but they're often at least enough to buy a big house in a fancy suburb. For some reason, nobody's crusading against the inheritance of wealth these days, but I don't like to see so much unearned wealth, even in a completely white society, and in our society there's the additional problem that our parents' and grandparents' wealth was earned at a time when blacks were severely discriminated against. These injustices are extremely difficult to remedy, but I've always felt that we should at least offer some tokens of our good will. That's why I've always voted for affirmative action. I'm beginning to wonder, though, whether we are causing as much bitterness as we're preventing. For one thing, some white students resent the preferential treatment for minorities; we're probably creating a certain amount of white ra-

cism. "Hate speech" was rare—in the North—before affirmative action; now it's become a big problem on campus. Without affirmative action, minorities wouldn't get into school so often, but they wouldn't be at the bottom of the class so often either. So, while we're relieving black frustrations with one hand, we're increasing them with the other hand. Maybe we're improving the black image by increasing the number of blacks in the universities, but is that offset by the fact that at any given school the average black will look less impressive and feel more frustrated under an affirmative action program than without affirmative action? Under affirmative action a black who would be average or above average at our school goes to Cornell where he's at the bottom of the class. The one who would be average or above at Cornell goes to Yale where he has academic difficulties. The one who would be terrific anywhere also goes to Yale and maybe gets on law review, but is falsely assumed to be just another affirmative action beneficiary by everyone who doesn't know him well. You couldn't devise a better system to make blacks look inferior and feel frustrated. Suppose you hated blondes, and wanted to persuade everybody that they're intellectually inferior. If you were a dictator, what would be a clever way to instill this idea? I'd do it by affirmative action. If every school were to begin admitting blondes preferentially, before long everyone would assume they can't compete. Instead of being more or less like everyone else, they'd now tend to be the slowest students. But since nobody likes to think he's dumb, and since they wouldn't in fact be especially dumb, the blondes would try to come up with another explanation of their difficulties. To blame it on affirmative action would require them to reject their Yale degrees and big scholarships. So they probably wouldn't do that. Instead they'd blame their problems on discrimination by brunettes, particularly if that's what all the pundits and liberal politicians and professors were saying. That's why it's not clear to me that this program improves race relations. Look what happened when we hired Ben. I was for him; in fact I thought it was a great thing. Now I'm not so sure. If he'd been white, we'd have figured that he was a smart guy but not smart enough for this faculty. Since he was black, we didn't look at it that way, and in fact after we interviewed him everyone talked about how bright he was, which I thought was pretty patronizing. Out of the goodness of our hearts, we ignored our usual hiring criteria in his case. Then what happened? First, someone let him teach the toughest course in the curriculum. The white students protested that he wasn't teaching adequately, and requested pass-fail grading. So a faculty committee investigated and decided that the

evidence didn't quite show that, or was inconclusive, and tried to drop the matter. But then he naturally felt humiliated and so he protested that he was in a racist environment, as proved by the unjustified complaints and the investigation of him, and we held a mass meeting where we sort of apologized to him and the black students who rallied to his defense and accused us of racism. Then the dean gave a speech saying we'd all learned a lot and we adjourned. Then Ben's article on standing never jelled, so we had to deny him tenure, and it left a bad taste in everybody's mouth. Would it have been worse if we'd never hired him in the first place?

BERNIE: I'll second that. Specifically with reference to stereotypes, the whole idea of affirmative action is stupid. It's *based* on stereotypes, so how can it dispel them? In the second place, it's totally false to say that unfair racial stereotypes and hostilities are caused by lack of contact. Most of the so-called "unprejudiced" people who crusade for every real or imagined civil rights measure have had hardly any real contact with poor blacks—like Teddy Kennedy sailing off Hyannis Port, and one or two Beverly Hills Levellers on this faculty I could mention.

TOM: But won't because you're too tactful?

BRAD: I see it's getting late. Before we vote, I'd like to share with you some of my thoughts as chairperson of the Committee—not necessarily the whole Committee's thoughts, but mine. I realize that there are some people who in perfectly good faith have concerns about affirmative action. We've had a very wide-ranging discussion here today, perhaps at times even a little too wide-ranging. It's easy to see why some of us make excellent Socratic teachers. But I think that some of the discussion has been rather misleading. There's been a tendency at times to paint with an overly broad brush, when what is needed—particularly on this topic—are nuanced judgments. Richard's account of the Committee's effort to deal with the problems of gays was, in my opinion, rather slanted. What actually happened is that someone trashed their bulletin board—a homophobic incident. So they came to us and the question was, what can we do? We haven't caught the perpetrators, and so someone suggested that we could express our concern in this way, lumping gays together with veterans and others who might be admitted under our diversity criterion. It was a way of disposing of a difficult situation. There have been other misleading statements during our debate today. The idea that we are a "one-party university," for example, will be news to the Economics Department, not to mention the Business School and the engineers. We may not have anyone writing conservative articles on our faculty, but we

don't have any Marxists either, so in that sense there's a kind of balance. I shudder to think what our appointments process would be like if we started considering everyone's politics. Are we supposed to ask them how they voted in the last election? Another example of exaggeration: someone made the point that despite affirmative action there are still plenty of blacks who are unhappy at their lack of progress. In general, I don't think that's been true in our law school, but even if it has been, what does it prove? Nobody ever promised to eliminate all racial problems with this program. The question is whether race relations in America would be better or worse if our universities were as lily white as they used to be. I don't think any reasonable observer doubts that the answer is that race relations would be much worse. There's also been talk about the need for other kinds of diversity, particularly on the faculty. Well, if you're trying to defeat a proposal, and are weak on the merits, it's always a last resort to point out that the proposal won't solve all of our problems. If we took that logic seriously, we'd be paralyzed: When was the last time we adopted a committee proposal that solved all the problems of the curriculum, or of grading or anything else? We also have heard all sorts of exotic hypotheticals about Palestinians and what-have-you. If we were equally inclined to question our grading, by cross-examining ourselves about the rationality of the line between a C- and a D+, we'd collapse in self-doubt. I'm also disturbed by comments implying that our minority students haven't been doing well in class. That hasn't been my experience. When we first adopted the program, there may have been problems, and perhaps some people were admitted who with the advantage of hindsight shouldn't have been. But today, with rare exceptions, I don't see much evidence of that. Our real problem isn't that we're admitting too many minorities; it's that we haven't been getting as many minority applications as we would like. Now we aren't supposed to be discussing faculty hiring, but let me say a word about Ben. I don't have any doubt that he had the necessary ability. I think in retrospect it's obvious that he took on too many outside commitments with the black community. Some of us remember how hard it was to reach him in his office; you'd always get the answering machine. He should have been counseled to prioritize better, recognizing that his first responsibility was teaching and scholarship, especially during the probationary period. As some of you know, that was also a difficult period in his personal life. So the whole matter could have been handled better. Let's not forget, however, that in the area of student admissions we already have an ongoing affirmative action program. I was particularly struck by

one of Leon's comments: We're not having a seminar discussion in which we quite properly have the luxury of creating elegant utopias; we're dealing here with a real-world problem. It's important that we act responsibly. Our admissions program has created strong expectations in the minority community, among our students, in the university administration, and in the practicing bar. I think it would undo much of the progress that has been made if we were to disappoint those expectations, particularly at a time when the national administration is perceived as not altogether well-disposed toward the poor and minorities. To me, it's unthinkable that we would be the first American law school—and the first department in this university—to waver on this. I believe you all received a message from the Black Law Student Association. In addition, the Committee received expressions of concern from the Women's Caucus, the Environmental Law Society, the Gay-Lesbian Caucus, the National Lawyer's Guild, the Day Care Task Force, the Public Interest Foundation, and the Student Council. All these organizations are strongly supportive of the program, and would be deeply disappointed if we were to retreat on affirmative action. I can't recall an issue on which so many student groups have expressed concern. I won't deny that there are imperfections, problems we need to work on, but that's true of everything. There are problems with the curriculum too, and problems with clinical education, and problems with seminars and the bar exam and so on. Bernie and I could sit here for an hour and draw up a list of dozens of anomalies in the curriculum and uncertainties about what we're accomplishing, and before long we'd have persuaded ourselves to abolish the law school. It's important to keep these difficulties in perspective, and not to overstate them. If we apply the same standard in appraising the success of this program as we apply in appraising the Socratic method, or proposals for new courses, or any other aspect of the educational process, I think we'll agree that it has been a success—not an unqualified success, but a success. I think that every person in this room can recall excellent minority students who have made valuable contributions to the educational experience. Many minority graduates of this school are now pursuing successful legal careers. As you know, one of them—Irma Connors—is vice-chairperson of our alumni organization. The other day I read that Alberto Hernandez has become a judge in California. I think we are entitled to feel some justifiable pride that we educated these two lawyers, who are beginning to make major contributions to society, as well as many others. I for one don't want to turn the clock back to the days when law schools and the legal pro-

fession were almost all-white and all-male. I'm not nostalgic for those "good old days." My reasons aren't simply instrumental. For me, racial integration has become something good in itself, a *goal*—a proximate cause of satisfaction—rather than an indirect *means* like tests and grades. From this goal, I logically deduce affirmative action as the only workable means. The Committee's proposal doesn't go as far as some of us would prefer, and it may go too far for some others. But we believe it's a measured response to a multi-faceted problem. It's not written in stone: If we decide, next year or five years from now, that it needs to be amended in the light of additional experience, or new court decisions, we'll be free to do so. But in the meantime let's give it a chance. One of the advantages of the Committee's draft is its simplicity and flexibility; without changing the text, we can adapt the administration of the diversity standard to reflect changing conditions and conceptions of what equity and sound educational policy require. Most of Bernie's hypotheticals, for example, could be resolved either way under our diversity standard, which superficially could be thought of as a disadvantage of our proposal, but in my opinion is an advantage because I'm sure none of us want to get into the business of periodically adding and subtracting from a list of races. Similarly, our proposal is flexible as to quantity; it's consistent with very strict or very lenient standards as to the requisite academic qualifications for minority applicants. One final thought: No matter how we decide this issue, there's an inescapable risk of error in all decisions about social policy; the question is where we should place that risk. I for one would prefer to take the risk of excessive generosity toward minorities, rather than the risk of not having tried hard enough to do our small part to address what is perhaps America's greatest problem.

PHILIP: Point of order: What would be the effect if the faculty voted this down? We've been talking as if this were a vote on affirmative action. Would we still have the old affirmative action program if we reject the Committee's proposal?

THE DEAN: Unless there's a motion to the contrary, yes, we would. As Brad indicated, our best judgment is that that would be a potential source of legal problems. It's 12:05, and I've reserved the afternoon session for the Curriculum Committee. So what is your pleasure? Shall we vote on this and then break for lunch? Any objections? Brad? Bernie? Norma? Anyone? Will those in favor of the motion signify by raising their right hands? Opposed? The motion carries, twenty-five to two. We stand adjourned until 1:30.